No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, APPELLANT

v.

LEE SHUBERT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
STANLEY N. BARNES,
Assistant Attorney General,
PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Special Assistants to the Attorney General,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Statute:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 36

UNITED STATES OF AMERICA, APPELLANT

v.

LEE SHUBERT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 18) is reported at 120 F. Supp. 15.

JURISDICTION

The judgment of the district court was entered on December 30, 1953 (R. 18). The petition for appeal was presented and allowed on February 18, 1954 (R. 24-25), and probable jurisdiction was noted on April 26, 1954 (R. 28). The jurisdiction of this Court is conferred by section 2 of the Ex-

pediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether, as a result of this Court's decisions in the baseball cases (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees*, 346 U. S. 356), the doctrine of *stare decisis* requires a holding that the theatrical business is excluded from the scope of the federal antitrust laws.

2. If not, whether the allegations of the complaint are sufficient to establish that appellees' business—*i. e.*, production, booking, and presentation, on a multi-state basis, of plays and other theatrical attractions—is "trade or commerce among the several States" within the meaning of sections 1 and 2 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to

be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought in February 1950 by the United States under section 4 of the Sherman Act (R. 1). The complaint charges (par. 50, R. 12) that the appellees have been engaged for many years in a conspiracy in restraint of interstate trade and commerce in the production, booking, and presentation of "legitimate" theatrical attractions,[1] and that they have conspired to monopolize,

[1] "Legitimate attractions" is used in the complaint to mean "stage attractions performed in person by professional actors," including plays, musicals, and operettas, but ordinarily not including stock-company attractions, vaudeville, burlesque, dance groups, bands, or concerts (par. 9, R. 3).

attempted to monopolize, and monopolized the booking[2] of these attractions throughout the United States and their presentation in ten leading cities,[3] in violation of sections 1 and 2 of the Act.

The appellees are three individuals—Lee Shubert,[4] his brother Jacob J. Shubert, and Marcus Heiman——and three corporations controlled by them—United Booking Office, Inc. ("UBO"), Select Theatres Corporation ("Select"), and L.A.B. Amusement Corporation ("L.A.B.") (R. 1-3). The principal business of UBO is the booking of legitimate attractions, but it also finances productions (R. 2). Select, together with subsidiaries, operates approximately nineteen theatres in various states, arranges booking for theatres in its chain, and produces various legitimate attractions (R. 2-3). L.A.B. operates three theatres and invests in numerous legitimate attractions (R. 3).

Following the decision of this Court in *Toolson* v. *New York Yankees*, 346 U. S. 356, the appellees, upon the authority of that decision, moved to dismiss the complaint (R. 17). The district court (Knox, C. J.), after submission of briefs and oral argument, granted the motion, and entered judg-

---

[2] "Booking" is defined in the complaint to mean the arrangements, generally made through a booking office, between producers and theatre operators for the routing and presentation of legitimate attractions (par. 14, R. 3).

[3] The cities are: Baltimore, Md.; Boston, Mass.; Chicago, Ill.; Cincinnati, Ohio; Detroit, Mich.; Los Angeles, Calif.; New York City, N. Y.; Philadelphia, Pa.; Pittsburgh, Pa.; and Washington, D. C. (par. 50, R. 12).

[4] Lee Shubert died prior to entry of judgment by the court below.

ment of dismissal. The court rendered the following opinion (R. 18):

> In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, and *Toolson* v. *New York Yankees, et al.*, decided by the Supreme Court on November 9, 1953.
>
> Upon the authority of these adjudications the complaint in the above entitled action will be dismissed.

The principal facts stated in the complaint—admitted for purposes of the motion to dismiss—are as follows:

Production of a legitimate theatrical attraction involves (1) assembling of its component elements, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting, and music; (2) rehearsals to weld the parts into an attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns, in New York City, and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, to New York City, and to road-show towns throughout the United States to fulfill these bookings and presentation arrangements (par. 24, R. 4). At the present time the cost of producing a play runs from $60,000 to $100,000, and of a musi-

cal from $200,000 to $300,000 (par. 25, R. 4). Persons other than the producer usually supply the necessary financing (*ibid.*). Frequently the production is incorporated and shares of stock are sold to investors, or the producer organizes a limited partnership (*ibid.*). All the appellees invest in legitimate attractions (pars. 3-7, R. 1-3).

After the production has been assembled and rehearsals have been completed, the attraction is presented in one or more "try-out" towns for the purpose of judging audience reaction and correcting observed deficiencies (pars. 20, 26, R. 4, 5). Audience reaction in try-out towns is important in gauging subsequent financial success in New York City and on the road (par. 26, R. 5). The attraction is then presented in New York City (par. 27, R. 5). If the run there is successful, the attraction is sent on tour to "road-show" towns throughout the United States (*ibid.*). This road-show tour is an "integral part of the exploitation of the attraction" and is the source of a "substantial part" of its profits (*ibid.*).

With the exception of a few cities, a legitimate attraction ordinarily cannot profitably play in a road-show town for more than a limited period of time, seldom exceeding two weeks. The producer of a play must therefore obtain playing dates in a number of suitable road-show towns, arranged so as to minimize lay-offs and travel between engagements. Successful operation of a theatre in a road-show town requires scheduling legitimate attractions so as to keep the theatre as continuously occu-

pied as possible during the theatrical season. Playing dates of a road-show town must therefore be arranged so as to meet the needs of both the producer and the theatre operator. (Par. 29, R. 5.)

UBO acts as middleman between producers and operators of theatres in try-out and road-show towns, but is regarded as the agent of the theatre operators and usually receives, as compensation for its services, five per cent of the operator's share of the theatre's gross receipts (par. 28, R. 5). Each year UBO enters into or renews agreements with theatre operators to act as their booking agent (par. 30, R. 5). After negotiation with the producer of an attraction, UBO tentatively schedules it at various theatres throughout the United States, and contracts covering presentation at these theatres are subsequently executed (*id.*, R. 5-6). The booking of legitimate attractions involves the cross-country routing of attractions in a constant stream to and from theatres in various cities throughout the United States (par. 28, R. 5).

The individual appellees control the booking of legitimate attractions in try-out and road-show towns in the United States (par. 37, R. 7). Apart from Select and a subsidiary thereof, UBO is the only concern in the country which books legitimate attractions throughout the United States (par. 5, R. 2). From 1932 to 1946, UBO followed a policy of entering into franchise agreements with theatre operators making UBO the exclusive booking agent for their theatres (par. 40, R. 8-9). About 1946, UBO discontinued formal franchise agreements

and adopted in lieu thereof a system of listings which, as tacitly understood by the parties, continued the previous contract arrangements (*id.*, R. 9).

The appellees operate or participate in the operation of approximately forty theatres in eight states (par. 42, R. 9). They operate or control all the theatres in "virtually all" key try-out towns, and in several important road-show towns (par. 41, R. 9).[5] Approximately fifty per cent of all the theatres in New York City are owned or operated by the Shubert appellees (pars. 15, 41, R. 3, 9).

In producing, booking, and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the various states, consisting of assemblage of personnel and property for rehearsals, transportation of such personnel and property to various cities, making and performing contracts under which attractions are routed and presented in various states, and transmission of applications, letters, memoranda, communications, contracts, money, checks, drafts,

---

[5] The appellees control or operate the only theatre in Baltimore, the six theatres in Boston, seven of the nine theatres in Chicago, the only theatre in Cincinnati, the only theatre in Los Angeles, and the four theatres in Philadelphia (par. 42, R. 9-10). They have an interest in two of the three theatres in Detroit (par. 42 E, R. 10). The only theatre in New Haven is operated under a five-year agreement with a subsidiary of Select, which provides that the operator will accept only attractions booked through this subsidiary (par. 43, R. 11). UBO has exclusive booking rights for the only theatre in Toledo, Ohio (par. 45, R. 11).

The "key" try-out towns are Boston, Philadelphia, Baltimore, and New Haven (par. 26, R. 4).

and other media of exhange across state lines (par. 49, R. 12).

The substantial elements of appellees' conspiracy to restrain and monopolize, attempted monopolization, and monopolization have been that the appellees, by concert of action: (a) compel producers to book their legitimate attractions exclusively through appellees, (b) exclude others from booking legitimate attractions; (c) prevent competition in presentation of these attractions; (d) discriminate in favor of their own productions with respect to booking and presentation; and (e) combine their power in booking and presentation in order to maintain and strengthen their domination in each of these fields (par. 51, R. 13).

The means which the appellees have used in carrying out the foregoing acts have included the following:

> Conditioning their investments in legitimate attractions produced by others, and conditioning the booking of legitimate attractions in try-out towns and in New York City, upon agreement by the producers to book these attractions exclusively through appellees (pars. 52(a), (d), (e), R. 13).
>
> Forcing producers to book their legitimate attractions for an entire theatrical season exclusively through appellees (par. 52(c), R. 13).
>
> Coercing producers who had booked through others to pay penalties or to accept discrimina-

tory booking terms, as a condition of obtaining booking through them (par. 52(f), R. 13).

Entering into agreements with theatre operators whereby the operators agree to present only attractions booked through appellees, and appellees agree not to book for competing theatre operators (par. 52(g), R. 13).

Excluding legitimate attractions booked by others from theatres operated by appellees (par. 52(h), R. 13).

Coercing and intimidating independent theatre operators in towns where appellees operate theatres to relinquish control of their theatres by threatening to deprive them, by virtue of appellees' control of booking, of access to legitimate attractions (par. 52(k), R. 14).

Some of the effects of appellees' concerted actions have been that producers have been forced to book exclusively with appellees on non-competitive terms; persons have been denied the right to engage in the business of operating a booking office; operators of independent theatres competing with those of appellees have been systematically excluded from obtaining legitimate attractions and, in many cities, have been forced out of business; in cities in which the appellees operate theatres, persons have been denied the right to engage in the business of presenting legitimate attractions, and the public has been deprived of access to legitimate attractions and the benefits which flow from open competition; and interstate commerce in production, booking,

and presentation has been unreasonably restrained, and in booking and presentation has been monopolized (par. 53, R. 14).

SUMMARY OF ARGUMENT

I

In *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, this Court held in 1922 that the business of professional baseball was not interstate commerce within the Sherman Act. Last term this Court refused to re-examine that decision. *Toolson* v. *New York Yankees*, 346 U. S. 356. The *Toolson* decision was based on a combination of three factors—the prior decision that baseball was not subject to the Act, baseball's reliance on that holding, and the failure of Congress, which had considered the decision, to bring the business under the Act.

None of these factors, however, is present in the case of the theatrical business. (1) This Court has never held that the theatrical business is exempt from the Sherman Act. On the contrary, *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, decided approximately one year after *Federal Baseball*, established that the theatrical business, in its interstate aspects, is subject to the Act. (2) In 1951 a Congressional committee conducted extensive hearings into the question of whether organized baseball should be exempted from the antitrust laws, and issued a lengthy report recommending against exemption. There has been no com-

parable Congressional consideration of exempting the theatrical business from the Act. (3) Organized baseball, in its development since 1922, could and did rely on the flat holding in *Federal Baseball* that it was not subject to the Sherman Act. The theatrical business, on the other hand, was put on notice in 1923 by the *Hart* case, *supra*, that restraints in the theatrical field similar to those charged in the instant case might contravene the Act.

The *Toolson* case did not reaffirm any broad principle of law that the business of giving local performances for the entertainment of the public is not interstate commerce. The decision represents solely an exceptional application of the doctrine of *stare decisis* based on the unique situation of, and limited to, the baseball business. Its implications do not extend to other businesses which may somewhat resemble baseball in that they, too, involve personal performances or exhibitions for public entertainment. The Court in *Toolson* expressly stated that it was not re-examining the "underlying issues" in *Federal Baseball*, and it reaffirmed *Federal Baseball* only "so far as that decision determines that Congress had no intention of including the *business of baseball* within the scope of the federal antitrust laws." 346 U. S. 357 (emphasis added).

II

If, as has been shown in Point I, the matter is not foreclosed by the *Toolson* decision, we submit that the complaint charges restraints upon, and at-

tempted and actual monopolization of, "trade or commerce among the several States" within the meaning of the Sherman Act, and therefore should not have been dismissed.

A. The business of producing, booking, and presenting legitimate stage attractions, as conducted by appellees, involves numerous commercial activities, and it constitutes trade in the "broad sense" in which that word is used in the Sherman Act. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 491. Appellees' activities do not cease to be trade because the final product of their endeavors—the performance of a play—involves primarily the application of artistic talents. In many businesses the final product is within the category of the arts, and the theatrical business is trade or commerce just as much as motion pictures, radio, television, or the other forms of entertainment which have been held to be within the Sherman Act.

B. In the course of appellees' business, personnel and property are assembled and are transported from state to state, contracts are made and performed under which theatrical attractions are routed to and presented in various states, and there is a "continuous flow" of communications, papers, and media of exchange across state lines. Such business plainly is carried on "among the several States." *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *United States* v. *Paramount Pictures*, 334 U. S. 131.

In the motion-picture cases just referred to, restrictions which permitted only theatres operated by the defendants to obtain films were held to violate the Sherman Act because they restrained the interstate flow of the films, and it was immaterial that the actual showing of the films "is of course a local affair." *Crescent Amusement Co.* case, *supra*, p. 183. In the instant case, appellees are alleged to have restrained interstate commerce in theatrical attractions by using their monopoly power over legitimate theatres to force producers to book exclusively with them, and it is similarly immaterial that the presentation of the play is "a local affair." A theatrical production, like a motion-picture film, represents a welding together of numerous elements, and it is an independent product which, like the film, is the subject of trade or barter.

To whatever extent the *Federal Baseball* case may reflect the view that the Sherman Act is inapplicable to interstate businesses where the subject of commerce involves an exhibition or personal effort, that view has been undermined in subsequent cases. In any event, the Sherman Act of 1890 cannot be construed to cover only the area of "commerce" defined by this Court in 1922.

ARGUMENT

The complaint charges appellees with using their monopolistic position in the business of booking theatrical attractions throughout the United States, and their monopolistic position in the ownership

and operation of theatres located in numerous cities in different states, to restrain interstate production, booking, and presentation of theatrical attractions. Appellees do not deny that, if their business is subject to the Sherman Act, the complaint sufficiently alleges substantive violations of that Act. The sole issue here is whether appellees' business is excluded from the scope of the federal antitrust laws. The district court, in holding that it is so excluded (R. 18), stated that the facts of this case are indistinguishable from those which were before this Court in the baseball cases (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200; and *Toolson* v. *New York Yankees*, 346 U. S. 356), and that, accordingly, on the authority of those decisions the complaint should be dismissed.

Appellees contend that "it has now been established, by application of the doctrine of *stare decisis* in the *Toolson* case, that as a matter of law the giving of local performances for the entertainment of the public, from time to time at places in different States, is not interstate trade or commerce within the meaning of those words in the Sherman Act." (Motion to Affirm, p. 5.) We shall show, however, under Point I, that this contention is based on a misconception of the holding in the *Toolson* case; that the doctrine of *stare decisis* as applied in the baseball cases does not compel a holding that the theatrical business is, in its interstate aspects, exempt from the federal antitrust laws;

and that the considerations found by the Court to justify application of the rule of *stare decisis* to baseball in the *Toolson* case are wholly absent in this case. We shall further show, in Point II, that under the applicable decisions of this Court the business of producing, booking, and presenting theatrical attractions on a multi-state basis, conducted in the manner alleged in the complaint, is clearly "trade or commerce among the several States" within the meaning of the Sherman Act.

I

This Court's Decisions in the Baseball Cases Do Not Require, Under the Doctrine of *Stare Decisis*, a Holding That the Theatrical Business Is Excluded from the Scope of the Federal Antitrust Laws.

In 1922, this Court held in *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Last term—more than 30 years later—this Court was asked to overrule that decision.[6] It declined to do so. *Toolson* v. *New York Yankees*, 346 U. S. 356. The *per curiam* opinion in the *Toolson* case leaves

[6] Considerable doubt arose in the intervening years whether, in the light of more recent decisions by this Court on the scope of the commerce power, the *Federal Baseball* case was still valid. *E.g.*, Notes, 53 Columbia Law Rev. 242, 248, 62 Yale Law J. 576, 608-612. In 1949, in *Gardella* v. *Chandler*, 172 F. 2d 402 (C.A. 2), the court distinguished the *Federal Baseball* case on the ground that the sale of radio and television broadcasting rights had sufficiently changed the interstate character of the business so as to subject it to the Sherman Act.

no doubt that the decision represents, and represents solely, an exceptional application of the doctrine of *stare decisis*, and that its implications do not extend beyond the applicability of the Sherman Act to the baseball business. The case is *sui generis*. The Court's one-paragraph opinion expressly relied upon a combination of three principal factors, peculiar to the situation of baseball, which justified the decision. None of these factors is present here.

(1) *Prior decision by this Court as to the specific business involved.* In the *Toolson* case the Court noted that it had held in 1922, in the *Federal Baseball* case, that the business of baseball was outside the scope of the federal antitrust laws. In the *Federal Baseball* case the Court held that even though professional baseball had interstate aspects (*e.g.*, transportation of personnel and equipment across state lines), the "essential thing" was "the exhibition", the "personal effort" of the players, which "would not be called trade or commerce in the commonly accepted use of these words" and hence the business was not "commerce among the States" within the Sherman Act. (259 U. S. at 208-209.) As to the theatrical business, however, the Court has never held that it is similarly exempt from the antitrust laws. On the contrary, at least since this Court's decision in 1923 in *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, it has been established, as is more fully shown below, that the theatrical business, in its interstate aspects, is subject to the federal antitrust laws.

(2) *Subsequent Congressional consideration.* In

Toolson the Court pointed out that "Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect." (346 U. S. at 357).[7] In 1951, a House subcommittee, following the introduction of several bills to exempt professional sports from the antitrust laws, conducted extensive hearings into "whether or not organized baseball should be exempted from the operation of the antitrust laws." (Hearings before the House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary on Organized Baseball, 82d Cong., 1st Sess., p. 1.) The Committee issued a lengthy report in which it carefully considered the problem and recommended that no legislation should be enacted. H. Rep. No. 2002, 82d Cong., 2d Sess., p. 232.

The theatrical business, on the other hand, can point to no comparable Congressional consideration of the question whether it should be exempted from the Act. Since, unlike baseball, the theatrical business had never been held by this Court to be outside the scope of the federal antitrust laws, there was no occasion for Congress to consider whether that business should be "brought" under these laws. The only question which might have been

[7] The mere failure of Congress to amend a statute after it has been considered by this Court does not ordinarily give rise to any inference of legislative ratification of the judicial construction. There must be persuasive evidence of specific legislative history reflecting clear and unequivocal affirmation of the decision. *Girouard* v. *United States*, 328 U.S. 61, 69; *Helvering* v. *Hallock*, 309 U.S. 106, 119.

submitted to Congress was whether the laws should be amended to grant an exemption to the theatrical business. It does not appear that any such proposals, if made, have ever received serious consideration in Congress.

(3) *Reliance on this Court's prior decision.* In the *Toolson* case the Court stated that, as a result of its decision in the *Federal Baseball* case and the subsequent failure of Congress to enact legislation bringing baseball under the federal antitrust laws, the baseball business "has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." (346 U. S. at 357). The theatrical business, on the other hand, did not and could not rely on any authoritative judicial or legislative determination that it was exempt from the federal antitrust laws; and it has not, and could not have, been left to develop over the years upon an understanding that it was exempt from antitrust regulation.

Professional baseball, in its development since 1922, could and did rely on the flat holding in the *Federal Baseball* case that it was not subject to the antitrust laws.[8] The theatrical business, however,

---

[8] Since 1922, professional baseball has developed, at great expense, the extensive minor league "farm system." H. Rep. No. 2002, 82nd Cong., 2d Sess., pp. 62-74, 177-189. The existence of this system "is inextricably tied" to the "reserve clause" in players' contracts (*id.*, p. 185). The alleged illegality of this clause was the gravamen of the complaint in the *Federal Baseball* case. See *National League of Professional Baseball Clubs* v. *Federal Baseball Club of Baltimore*, 269 Fed. 681, 683 (C.A. D.C.).

had been put on notice by this Court's decision in *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, that restraints in the theatrical field similar to those charged in the instant case might well contravene the Sherman Act. The *Hart* case, which was decided approximately one year after the *Federal Baseball* case, was a private treble-damage action based on the defendants' alleged combination to control the booking and presentation of vaudeville acts in theatres throughout the country. The complaint alleged that the defendants' business included the making of contracts pursuant to which there was a "constant stream" of interstate commerce involving performers and their accompanying scenery, music, costumes, and animals (262 U. S. at 272-273). The district court, on the authority of the *Federal Baseball* case, dismissed the complaint for want of jurisdiction.

This Court, in an opinion by Mr. Justice Holmes (who also had written the opinion in the *Federal Baseball* case), unanimously reversed.[9] The Court stated (p. 273) that the basis of the district court's ruling was that "the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental

---

[9] The result was perhaps foreshadowed by Judge Learned Hand's decision in *Marcinelli* v. *United Booking Offices*, 227 Fed. 165 (S.D. N.Y., 1914). That was a private antitrust suit charging that the defendants, pursuant to a conspiracy to monopolize the booking of vaudeville acts throughout the country, had driven the plaintiff, who also was engaged in booking vaudeville, out of business. Judge Hand held that the complaint alleged a conspiracy in restraint of interstate commerce.

to that." It noted (*ibid.*) on the other hand that plaintiff contended that in the transportation of vaudeville acts the apparatus "sometimes is more important than the performers." The Court concluded (p. 274) that the complaint, at least to that extent, sufficiently alleged a violation of the Act to permit the plaintiff to go to trial, since "what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently."

Appellees argue (Motion to Affirm, pp. 8-11) that the subsequent history of the *Hart* litigation vitiates its value as a precedent. They state (*ibid.*) that at the subsequent trial the complaint was dismissed at the close of the plaintiff's case for failure to prove that the interstate aspects of the business were more than "incidental," that the Court of Appeals affirmed, *Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. 2d 341 (C.A. 2), and that this Court denied certiorari, 273 U. S. 703. They contend (*id.*, pp. 11, 14) that the "necessary effect" of such denial of certiorari was to allow the theatrical business to remain outside the scope of the Sherman Act, at least in the circuit in which its major activities are conducted, and that as a result of the *Hart* litigation and the later case of *Conley* v. *San Carlo Opera Co.*, 163 F. 2d 310 (C.A. 2) (discussed *infra*, p. 30), the theatrical business also "has been allowed to develop over a long period of years upon the premise that the Sherman Act did not apply to it."

We submit, however, that in determining

whether this Court should invoke the doctrine of *stare decisis* to preclude re-examination of one of its precedents, the pertinent inquiry is whether the industry has relied on the decision thus sought to be insulated from reconsideration, not whether it has relied upon a decision of some other court. The rationale of *stare decisis* is that sometimes it is more important that a question be determined with finality than that it be determined correctly. In such circumstances, therefore, a court may consider itself bound by its prior decision, regardless of its present view of the merits.

As appellees concede (Motion to Affirm, p. 11), the denial of certiorari in the second appeal of the *Hart* case did not constitute a holding by this Court that the theatrical business was not subject to the Sherman Act. Indeed, this Court had held the contrary in the prior appeal in the very case (see *supra*, pp. 20-21). Although the Court has applied the principle of *stare decisis* many times, we know of no instance when it has considered itself bound by a decision of a court of appeals which it had declined to review. Indeed, appellees' theory that reliance on such a lower court decision is sufficient to justify this Court in refusing to consider the same question at a later time would, in many cases, make the denial of certiorari equivalent to an affirmance of the decision which the Court refused to review.[10]

---

[10] Appellees also cite (Motion to Affirm, pp. 7-8) a letter of the then Assistant to the Attorney General, dated April 2, 1920, to the Chairman of the Federal Trade Commission in

In sum, therefore, none of the unique combination of considerations which led this Court in *Toolson* to decline to reexamine its earlier holding in the *Federal Baseball* case as to baseball is present here. There is no justification for a like holding that the doctrine of *stare decisis* requires a decision, without examination of the underlying issues, that the theatrical business is exempt from the federal antitrust laws. The holding of the *Toolson* case is limited to the narrow issue there decided—the applicability of the Sherman Act to professional baseball—and it did not determine the applicability of the Act to any other business. We cannot read the *Toolson* case as even remotely implying that the theatrical business, which is an important part of our commercial structure, is in its interstate aspects exempt from the Sherman Act.

Appellees contend, however, that the Court in the *Toolson* case not only affirmed the result of the *Federal Baseball* case, but also affirmed the "principle of law" underlying the latter case, which, as stated by appellees, is that "a business—whether

---

which the former concurred in the view, expressed by his predecessors in 1911 and 1917, that "the business of presenting and executing theatrical entertainments is not commerce within the constitutional sense" and hence not within the federal antitrust laws. In the light of the *Hart* decision by this Court in 1923, and the filing of the instant case by the Attorney General in 1950, these rulings must today be regarded as erroneous and without significance. It will not seriously be suggested that this Court is precluded, because of possible reliance by some persons upon these unpublished views of subordinate officials of the Department of Justice, from considering and deciding the issue of statutory construction on its merits.

baseball or something else—that consists of giving local performances for the entertainment of the public is not interstate trade or commerce in spite of the movement of persons and paraphernalia across State lines that are made necessary by the fact that local entertainment is offered from time to time at places in different States * * *." (Motion to Affirm, p. 5.)[11]

This broad interpretation of the *Toolson* case cannot be reconciled with the language of the Court's opinion, which concluded with the following sentence: "*Without re-examination of the underlying issues*, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no intention of including *the business of baseball* within the scope of the federal antitrust laws." (346 U. S. at 357; emphasis added.) The Court could hardly have made a plainer statement that it was holding only that the business of baseball was not, until Congress should provide otherwise, subject to the Sherman Act. The "underlying issues" which the Court explicitly did not reach and decide, and which were reached and discussed by the dissenting Justices, were those tendered by the

---

[11] A similar contention is made by appellees in No. 53, *United States* v. *International Boxing Club, et al.* They state: "Since a boxing bout, like baseball, is a purely local exhibition, * * * the principle laid down in the *Federal Baseball Club* case adhered to, on the basis of *stare decisis*, in the *Toolson* case, must be applicable here * * *." (Motion to Affirm, No. 53, p. 4.)

petitioners, namely, whether in the light of the present interstate aspects of baseball, and of recent decisions as to the scope of "interstate commerce",[12] the business of baseball should now be regarded as within the Sherman Act. The *Toolson* case affirmed no "principle of law" as to the construction either of the commerce clause or of the Sherman Act. It held only that, because of organized baseball's development in reliance on the *Federal Baseball* case and the subsequent failure of Congress to bring baseball under the antitrust laws, the Court would not reexamine the underlying issues presented, but would leave the status of baseball under the antitrust laws unchanged until and unless Congress should provide otherwise. The case cannot be read as holding that, if the question of statutory construction were reexamined on its merits, baseball would now be held not subject to the Sherman Act, or that other businesses or sports which may be comparable to baseball—in that they involve personal performances or exhibitions for public entertainment—are also exempt from the Act.

In putting its decision on so narrow a ground, the Court neither approved nor disapproved of the merits of the statutory interpretation of the Sherman Act which was made in the *Federal Baseball* case. The *Toolson* decision neither strengthened nor weakened the authority of the *Federal Baseball*

---

[12] Cf. *Wickard* v. *Filburn*, 317 U.S. 111; *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219.

case as a general precedent bearing on the construction of the Sherman Act to businesses or activities other than baseball. Appellees erroneously treat the Court's explicit refusal to re-examine the underlying issues of statutory construction in *Toolson* as equivalent to a reaffirmation of the decision of those issues made in the *Federal Baseball* case. This distorts the meaning and significance of the Court's action in the *Toolson* case which was a specialized application of the doctrine of *stare decisis*.

As the Court has often recognized, "*stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula * * *." *Helvering* v. *Hallock*, 309 U. S. 106, 119. Application of the doctrine must rest upon a showing that "by the accretion of time and the response of affairs, substantial interests have established themselves," and "interests created or maintained in reliance" on the prior precedents (*ibid*).[13]

It was because of such factors—baseball's reliance upon the broad and unqualified holding in the *Federal Baseball* case that it was not subject to the antitrust laws; the failure of Congress, which had the problem under consideration, to take action;

---

[13] "* * * the rule of *stare decisis* embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right." Mr. Chief Justice Stone, dissenting, in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, at 579.

and the development of the business on the justified understanding that it was exempt from federal antitrust regulation—that the Court in *Toolson*, "[w]ithout reexamination of the underlying issues" declined "to overrule the prior decision and, with retrospective effect, hold the legislation applicable." (346 U. S. at 357.) In the present case, however, the Government is not asking the Court to overrule any prior decision relating to the application of the Sherman Act to the theatrical business. To sustain the complaint here would not involve subjecting the theatrical business "with retrospective effect" to legislation from which it has previously been held exempt by authoritative judicial decision. On the contrary, appellees are requesting the Court to hold now, for the first time since the Sherman Act was enacted in 1890, that the Act does not apply to their business. The only pertinent decision by this Court—the *Hart* case in 1923—indicated that the theatrical business in its interstate aspects was not immune from the Act. Thus, there is no reason why this Court should now deem itself barred by the doctrine of *stare decisis* from examining on its merits the question of statutory construction presented by this case, namely, whether the interstate phases of the theatrical business, as alleged in the complaint, are subject to the Sherman Act. To that question we now turn.

II

The Business of Producing, Booking, and Presenting, on a Multi-State Basis, Legitimate Theatrical Attractions Is "Trade or Commerce Among the Several States" Within the Sherman Act.

If—as has been argued above—the doctrine of *stare decisis* does not foreclose the matter, we submit that the complaint alleges restraints upon, and attempted and actual monopolization of, a business which clearly is "trade or commerce among the several States" within the meaning of the Sherman Act, and should not have been dismissed. We shall show, first, that appellees are engaged in "trade or commerce," and, secondly, that such trade or commerce is "among the several States."

A. The business of producing, booking, and presenting legitimate stage attractions, as conducted by appellees, plainly is trade or commerce. It involves such typical commercial activities as the raising of capital to finance productions (par. 25, R. 4), the hiring and payment of personnel for the production (par. 24, R. 4), the negotiation and execution of contractual arrangements for the booking and presentation of productions in theatres in a number of cities (*ibid.*; par. 30, R. 5-6), the transportation of personnel and scenery to such theatres (par. 24, R. 4), the arrangement of playing schedules at such theatres so "as to minimize lay-offs and travel between engagements" (par. 29, R. 5), and the ownership and operation of a large number of legitimate theatres throughout the country (par. 42, R. 9-10). In the course of such

activities, there is a "continuous flow" of applications, letters, contracts, memoranda, communications, money, checks, drafts, and other media of exchange (par. 48, R. 12).

Such activities constitute trade in the "broad sense" in which that word is used in the Sherman Act. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 491. Appellees are engaged in trade just as much as real-estate brokers (*ibid.*), producers and distributors of motion pictures (*United States* v. *Paramount Pictures*, 334 U. S. 131), an organization that provides medical care for its members (*American Medical Association* v. *United States*, 317 U. S. 519), a news-gathering and distribution agency (*Associated Press* v. *United States*, 326 U. S. 1), or insurance underwriters (*United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533). "Their activity is commercial and carried on for profit", and "[t]he competitive standards which the Act sought to preserve in the field of trade and commerce seem as relevant to the * * * [theatrical] business as to other branches of commercial activity." *National Association of Real Estate Boards* case, *supra*, p. 492.

Appellees' activities do not cease to be trade because the final product of their endeavors—the actual performance of the play—involves primarily the application of artistic talents, namely, those of actors, singers, and other performers. Many businesses deal in products which are within the category of the arts, but that does not negative

their commercial character. Motion pictures, for example, are a recognized art form, yet "[a]dmittedly * * * [their] production, distribution and exhibition—constitute a part of interstate commerce." *William Goldman Theatres* v. *Loew's*, 150 F. 2d 738, 742, 744 (C. A. 3), certiorari denied, 334 U. S. 811. It is the commercial, not the artistic, aspects of the theatrical business which are the subject of this suit.

This distinction between the two aspects of the theatrical business is clearly shown by comparing *Ring* v. *Spina*, 148 F. 2d 647 (C. A. 2), certiorari denied, 335 U. S. 813, with *San Carlo Opera Co.* v. *Conley*, 72 F. Supp. 825 (S.D.N.Y.), affirmed, 163 F. 2d 310 (C. A. 2). In the *Ring* case, the court held that a contract relating to the preparation and out-of-town try-outs of a musical play being readied for Broadway involved interstate commerce within the Sherman Act. In the *Conley* case, on the other hand, the district court held that a contract by a professional singer to sing for an opera company, which required him to travel interstate, did not relate to interstate commerce within the Federal Arbitration Act. The court distinguished the *Ring* case on the ground that it did not involve "a contract for the individual performance of an artist" (p. 831), but related to the commercial aspects of theatrical production.

Entertainment in this country today is big business, and in its interstate aspects it cannot claim exemption from the Sherman Act because performances involve primarily the skill of individual

artists. The theatrical business—the business of producing, booking, and presenting plays and other "live" theatrical attractions—is trade or commerce just as much as motion pictures, radio, television, and other forms of entertainment (also involving performances of living persons) which have been held within the Sherman Act.[11]

B. Appellees' business is carried on "among the several States." It consists of "manufacturing [producing] the commodity [the play] in one State, finding customers for it in other States, making contracts of lease [exhibition] with them, and transporting the commodity leased from the State of manufacture [production] into the States of the lessees [exhibitors]", *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309, and it involves "a constant, continuous stream of trade and commerce between the States" (par. 49, R. 12). In the course of such business, personnel and property are assembled and are transported from state to state, contracts are made and performed under which theatrical attractions are routed to and presented in various states (*ibid.*), and there is a "continuous flow" of applications, memoranda, communications, con-

---

[11] In addition to motion pictures (see cases cited, *infra*, p. 32), radio (*Lorain Journal* v. *United States*, 342 U.S. 143), and television (*United States* v. *National Football League*, 116 F. Supp. 319, 327-328 (E.D. Pa.)), the Sherman Act has been held applicable to such businesses as the licensing of rights to play popular music (*Alden-Rochelle* v. *ASCAP*, 80 F. Supp. 888 (S.D. N.Y.)), and the booking of "name bands" to ballrooms and dancehalls (*Finley* v. *Music Corp. of America*, 66 F. Supp. 569 (S.D. Calif.)).

tracts, money, checks, drafts, and other media of exchange across state lines (par. 48, R. 12).

In short, appellees' business is conducted on a nation-wide basis, "involves continuous and extensive use of the mails and instrumentalities of interstate commerce," *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432-433, and its interstate aspects are necessary to, and inseparable from, its local aspects. Plainly, it is interstate commerce. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *United States* v. *Griffith*, 334 U. S. 100; *Schine Theatres* v. *United States*, 334 U. S. 110; *United States* v. *Paramount Pictures*, 334 U. S. 131; *Manderville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219; *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460; *William Goldman Theatres* v. *Loew's*, 150 F. 2d 738 (C. A. 3), certiorari denied, 334 U. S. 811.

In the motion-picture cases, *supra*, restrictions which permitted only theatres operated by the defendants to obtain films on which "photoplays" appear—restrictions exactly like those alleged here with respect to plays—were held to violate the Sherman Act. Such restrictions on exhibition were held to restrain or monopolize interstate commerce because the films which were shown in the theatres were sent from producers to distributors across state lines, and it was immaterial that the actual "showing of motion pictures is of course a local affair." *Crescent Amusement Co.* case, *su-*

pra, p. 183; cf. *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501; *C. E. Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255. Similarly, in the instant case interstate commerce in the production, booking, and presentation of legitimate attractions is alleged to have been restrained, and interstate commerce in their booking and presentation to have been monopolized (par. 53(g), R. 14), by appellees' use of their monopoly power over legitimate theatres to force producers to book exclusively with them (par. 52, R. 13-14).[15] And it is equally immaterial here that the actual presentation of a play on the stage of a theatre "is of course a local affair".

In both industries, the restraints are on the interstate flow of the product—the film in one case, the theatrical product in the other—and it makes no difference that in the motion-picture industry the "play" has been put on film, whereas here it is the theatrical production itself which moves in interstate commerce. A theatrical production, like a motion-picture film, represents a welding together of a number of elements—script, actors, scenery, costumes, music, and lighting—into a composite whole which is distinct from its components. Cf. *Ring* v. *Spina*, 148 F. 2d 647, 650 (C. A. 2), certiorari denied, 335 U. S. 813. It constitutes an independent product which, like the film, is the subject of trade and barter. A theatri-

[15] These allegations sufficiently show restraints on interstate commerce to permit the case to go to trial. Cf. *United States* v. *Employing Plasterers Association*, 347 U.S. 186.

cal production moving across state lines with its personnel and paraphernalia certainly is no less interstate commerce than the interstate transmission of such intangible items as electric current (*Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 432; *United States* v. *Public Utilities Commission of California*, 345 U. S. 295, 300), electrical impulses over a telegraph line (*Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11), radio (*Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279; *Lorain Journal* v. *United States*, 342 U. S. 143), television waves (*Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 154 (C. A. 3), certiorari denied, 340 U. S. 929), or news (*Associated Press* v. *United States*, 326 U. S. 1).

In addition to the interstate movement of the theatrical productions themselves, there is present in this case the same "continuous and indivisible stream of [commercial] intercourse among the states" that led this Court to hold, in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, that the business of fire insurance constitutes interstate commerce. As already noted, the complaint alleges (pars. 48, 49, R. 12) that, in the usual course of appellees' business of producing, booking, and presenting legitimate attractions, there is a "continuous flow" of applications, letters, memoranda, communications, contracts, money, checks, drafts, and other media of exchange across state lines. This use of "[t]he mails and the instrumentalities of interstate commerce [is] vital

to the functioning of," and "involve[s] the very essence of" appellees' business, and these "interstate commercial transactions * * * are commerce which concerns more states than one." *North American Co.* v. *Securities and Exchange Commission*, 327 U. S. 686, 694, 695. See also *Polish Alliance* v. *National Labor Relations Board*, 322 U. S. 643; *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

To the extent that the *Federal Baseball* case may be read as reflecting the view that the Sherman Act is inapplicable to interstate business where the "subject of commerce" is an "exhibition" or "personal effort", that view has been undermined in subsequent cases, particularly *Hart* and the motion picture, insurance, medical care, and real estate broker decisions (*supra*, pp. 20-21, 29, 32-33, 34-35).[16] In any event, there is no plausible basis for contending that the Sherman Act of 1890 should be construed to cover only the area of "commerce" defined by this Court in 1922. This Court, distinguishing cases like *Helvering* v. *Griffiths*, 318 U. S. 371, and *Parker* v. *Motor Boat Sales*, 314 U. S. 244,

---

[16] In holding in *Federal Baseball* that the transportation of players and equipment was merely incidental, this Court relied on *Hooper* v. *California*, 155 U.S. 648. That case upheld a California statute regulating the insurance business, against the challenge that it restrained interstate commerce, on the ground that "[t]he business of insurance is not commerce" (p. 655). The authority of the *Hooper* case was severely shaken, if not overruled, by the *South-Eastern Underwriters* case, *supra*. Cf. *Lorain Journal* v. *United States*, 342 U.S. 143, 151-152.

stated in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 557-558, "We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way." This is *a fortiori* true here, where the Sherman Act of 1890 is sought to be frozen within the mold of a judicial decision *(Federal Baseball)* rendered thirty-two years later, the scope of which was narrowed by a decision the following year *(Hart)*.

Whatever the validity of appellees' interpretation of *Federal Baseball* as applied to the business of "giving local performances or exhibitions," it is not applicable to the business of producing, booking, and presenting, on a multi-state basis, legitimate theatrical attractions. The restraints alleged in this case are not on the local exhibition of plays, but on the entire theatrical business, with its myriad of interstate aspects. In the theatre the play's the thing, but in the theatrical *business* there are many things: actors, stage hands, press agents, authors, agents, producers, "angels", theatre owners, directors, designers, scenery, costumes, lighting, music, bookings, out-of-town try-outs, etc. The "first night" of a play is, in fact, the last night of a process—commercial as well as artistic—of integrating these component persons and things into a presentation which, it is hoped, the public will ap-

preciate and patronize. This theatrical business does not lose its character as "trade or commerce" because the end-product is a dramatic work offered to the public in local theatres. The same reasoning would permit a national book publisher or distributor to assert that he is not engaged in "trade or commerce" because the end-product of his business is a literary work offered to the public in local bookshops.

In conclusion, appellees would use the *Toolson* case to create an exemption from the Sherman Act for the theatrical business. But the exemption which baseball now has results solely from the application of the doctrine of *stare decisis* and, as we have shown, there is no basis for applying that doctrine to require a decision that the theatrical business is not subject to the Act. We have also shown that, on the basis of applicable decisions of this Court, the theatrical business is covered by the Act; granting it an exemption would require the *pro tanto* overruling of those decisions. "[I]f exceptions are to be written into the [Sherman] Act, they must come from the Congress, not this Court." *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 561.

CONCLUSION

The judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
PHILIP ELMAN,
DANIEL M. FRIEDMAN,
Special Assistants to the Attorney General.

AUGUST, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE 1954 809208 178